

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Telecommunications Relay Services And Speech-to-) Dockets 98-67  
Speech Services for Individuals with Hearing and )  
Speech Disabilities )

To: The Commission

***COMMENTS ON PAYMENT FORMULA AND FUND SIZE ESTIMATE FOR  
THE INTERSTATE TRS FUND FOR 2004-05; REQUEST FOR FULL  
COMMISSION ACTION; AND REQUEST FOR DESIGNATION OF  
EVIDENTIARY HEARING***

**NDS ON VIDEO RELAY SERVICES, INC.**

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Hands On Video Relay Service, Inc. (“Hands On”), by its counsel, and pursuant to Public Notice, CA 04-1258 (May 4, 2004), submits its comments on the National Exchange Carrier Association’s May 3, 2004 proposed payment formula and fund size estimate for the Interstate Telecommunications Relay Service (“TRS”) Fund (“NECA Rate Submission”). In support, the following is shown.

## I. Introduction and summary.

Hands On is a contract provider of Video Relay Service (“VRS”) for two of the larger interstate telephone carriers, AT&T and MCI. In addition, it operates as a stand-alone VRS provider pursuant to certification from the State of Washington. Hands On commenced VRS operation in August of 2002 on a beta test basis, and commercial operation in December of 2002. Hands On now operates two VRS call centers. One is located at its corporate headquarters in Rocklin, CA. The second recently opened in Vancouver, Washington. As such, Hands On is in a unique position to comment on the NECA Rate Submission. With the exception of the issue of the proper calculation

of profit for the provision of TRS, these comments will address solely issues relating to the proposed VRS rate.<sup>1</sup>

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<sup>1</sup> Although Hands On generally supports NECA's assumptions and methodology used to calculate the proposed size of the Interstate TRS Fund, because we disagree with NECA's proposed rate calculation, we believe the fund size is inadequate. Correcting the proposed per minute payment rates will serve to increase the total Interstate TRS Fund size requirement.

Since the Consumer and Governmental Affairs Bureau (“CGB”) cut the VRS payment rate some 55 percent to \$7.751 with less than 12 hours notice, effective July 1, 2003, significant portions of the deaf and hard of hearing community have been denied the functionally equivalent TRS service Section 225 of the Communications Act of 1934, as amended, requires. This portion of the deaf and hard of hearing community are those persons for whom American Sign Language is their primary means of communication. They have been denied functionally equivalent telecommunications service because the VRS payment rate is inadequate to allow providers to provide quality, on demand, 24 hour VRS service. Prior to July 1, 2003, the community had available 24 hour service, seven days a week. Now it does not. Prior to July 1, 2003, the community could access VRS with a wait time averaging no more than 20 seconds. Now wait times can be as long as 20-30 minutes.<sup>2</sup> Prior to July 2003, VRS providers and carriers were making significant efforts to improve their product, including the video codec so that deaf consumers could be assured the highest quality video service on par with high quality audio service hearing persons receive over the public switched telephone network (“PSTN”).<sup>3</sup> Since July 2003, technological improvement has been largely stymied because providers lack sufficient funds to devote toward the improvement of the service.

The degradation in VRS quality has not gone unnoticed by the deaf and hard of hearing community. Reference to the docket in this proceeding as of May 21, 2004, shows some 700 public comments filed since July 1, 2003. This compares to some 1800 filed since May of 1998 when the

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<sup>2</sup> Hands On’s wait times have consistently average more than a minute since July of 2003, sometimes much more than a minute. Anecdotal evidence indicates that certain other providers have much longer wait times.

<sup>3</sup> The widely available free NetMeeting software, a Microsoft product, is hopelessly outdated and inadequate to provide sufficient frames per second to achieve quality video relay service. That is why Sorenson uses its EnVision software, and Hands On employs its VideoSign

docket was established. The bulk of those 700 some comments consist of deaf consumers begging the Commission to protect their telecommunications lifeline, Video Relay Service. They want the Commission to set a funding level so that VRS may be provided on a 24 hour basis, so that calls can be answered in a reasonable amount of time and so that the service can improve to take advantage of technological progress such as we see in the telephone service provided the hearing community.

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software, both of which offer superior video quality than NetMeeting.

Unfortunately, the proposed reimbursement rate for 2004-05 will not solve the service problems VRS faces. Rather it will make the situation worse. It should require no leap of logic to understand that if VRS service is inadequate at a reimbursement rate of \$7.751 per minute, it will not improve by *lowering* the rate to \$7.29. There is thus a clear disconnect in the proposed VRS rate and reality. That should have signaled to NECA that its rate design methodology, or its input data, if not both, are deficient.<sup>4</sup> In other words NECA should have performed a reality check. Since it apparently did not, it is now incumbent on this Commission to fulfill its responsibility under Section 225(b)(1) of the Act to ensure the availability of functionally equivalent relay service. This requires the Commission to examine the proposed VRS rate with as much attention -- if not more -- than was given to the 2003-04 proposed rate. There, CGB was plainly concerned that the proposed rate level of \$14.023 was too high. Now this Commission has more than adequate evidence – indeed clear and convincing – evidence from VRS consumers themselves, that the VRS rate NECA is proposing is too low.

It is time for the Commission to perform a reality check since NECA was unwilling or unable to do so. If this Commission is truly concerned with providing the deaf and hard of hearing community with VRS that is functionally equivalent with the phone service provided hearing persons, it will conduct a full review of the proposed VRS rate, and will increase that rate to a level that will in fact provide adequate, functionally equivalent VRS service.

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<sup>4</sup> Although we have serious problems with the methodology and assumptions NECA has employed in fashioning the VRS rate, we wish to emphasize that we understand NECA believes it is following the FCC's direction in its June 30, 2003, interim rate order. Ultimately, therefore, it is for the Commission to give adequate instructions to NECA to fix this seriously deficient rate recommendation.

That full review will show, as we show herein, that NECA's proposed 2004-05 VRS rate is flawed for several reasons. First, NECA did not obtain sufficient information to formulate a rational, compensatory rate for functionally equivalent VRS service.

Second, although NECA purported to follow the Bureau's June 30, 2003, interim rate order in formulating the 2004-05 VRS rate, that June 30, 2003, interim rate order suffers serious debilitating flaws for the reasons explained in the record in this docket, and as explained in the confidential submissions of various VRS providers and carriers.

Third, the June 30, 2003, interim rate order itself is an inadequate guide for NECA's formulation of the 2004-05 VRS rate, because it totally lacks standards and guidelines for evaluating provider cost data.

Fourth, even if the June 30, 2003 interim rate order, were an appropriate guide – and it is not – there is no evidence in NECA's rate filing that NECA appropriately followed whatever guidance it got from the interim rate order.

Fifth, it appears that NECA now sees itself as an independent judge of appropriate VRS expense items and has abrogated to itself the authority summarily to exclude such cost items. The FCC, however, has never delegated this authority to NECA and the FCC itself has no statutory authority to make this delegation. NECA's action in rejecting expense items, therefore, is *ultra vires*, and cannot be upheld without a searching independent review by this Commission.

Sixth, to the extent NECA has been delegated authority to exclude provider costs, providers due process rights are violated since they have neither notice nor an opportunity to be heard on those exclusions, nor access to the information NECA used in making its cost evaluations. In this connection, the opportunity to submit these comments on the proposed VRS rate is totally



inadequate to afford providers due process since the information NECA relied upon, and the cost adjustments it made have not been disclosed and made available for comment.

Seventh, to the extent NECA was willing to explain its methodology to Hands On with respect to adjustments made to Hands On's costs, most of those adjustments were arbitrary and capricious, apparently the result of a lack of understanding of those items, or apparently result from an unintentional, but nevertheless invidious bias which serves to penalize start-up stand-alone operators such as Hands On in favor of integrated providers, carriers or larger diversified companies.

For all of these reasons, the Commission can have no confidence in NECA's 2004-05 VRS rate recommendation. In the absence of adequate data to fashion the appropriate rate, the Commission's only alternative is to hold an evidentiary hearing pursuant to the provisions of Section 204 of the Act.

***II. This proceeding must be referred to the full Commission.***

Many of the issues presented in connection with the proposed 2004-05 VRS rate flow directly from CGB's June 30, 2003 interim rate order. That order is currently on reconsideration, being considered by the full Commission. It would conduce to the orderly work of the Commission for the full Commission to resolve this proceeding as well in connection with its determination on reconsideration of the 2003-04 interim rate order. Moreover, FCC Rule Section 0.361 denies the Chief of CGB the authority to decide matters "that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines." It is plainly apparent from CGB's statements in the June 30, 2003, interim rate order, at para. 34, that novel questions of law fact and policy were presented. . The most glaring is that of the denial of profit and the proscription of a 11.25 rate of return on investment only. As the order admitted the FCC's rules are silent on these matters. Thus, these matters, still unresolved, may not be decided on delegated authority, but must be referred to the full Commission for resolution.

***III. Section 225 obligates the Commission to reject the 2004-05 VRS rate recommendation.***

The Commission should reject NECA's proposed rate recommendation for the same reasons the Telecommunications Relay Service Advisory Council unanimously rejected that proposal at its April 2004 meeting. Quite simply, the proposed rate would not allow the provision to the deaf and hard of hearing community of functionally equivalent VRS. In this connection, Hands On has reviewed the comments filed by its fellow VRS provider, Communications Services for the Deaf, Inc. ("CSD") on May 19, 2004. Hands On fully endorses and agrees with CSD's well reasoned comments in all respects and hereby incorporates those comments by reference herein. In the interest of brevity, Hands On will avoid repeating these points which CSD so ably and eloquently makes. Rather, Hands On will focus on the many procedural and substantive shortcomings of NECA's 2004-05 VRS rate recommendation.

***A. NECA did not obtain sufficient information to formulate a rational, compensatory rate for functionally equivalent VRS.***

In fashioning its rate recommendation, NECA apparently was aware of the widespread dissatisfaction in the deaf and hard of hearing community with the quality of VRS service. Accordingly, when NECA announced its proposed VRS rate recommendation at the TRS Advisory Council meeting in April of 2004, it was stated that no adjustment was made to video interpreter costs. That somewhat arbitrary, but nevertheless well intentioned decision, unfortunately is not sufficient to resolve VRS quality issues. First, to the extent other necessary expense items were rejected, the result will nevertheless be felt by consumers. This is because providers will still have to make these excluded expenditures, and will be forced to cut back on interpreter costs, which is one of the larger, if not the largest, VRS cost item.

A more fundamental problem, however, is that in obtaining interpreter related expenses, NECA did not look at the crucial issue of service quality. In response to a question from the audience at the April TRS Advisory Council meeting, NECA disclosed that the data it reviewed did not show the grade of service for which providers were costing. This one fact standing alone renders NECA's analysis of provider costs an invalid apples to oranges comparison. For that reason alone, the Commission must reject NECA's rate recommendation and either send it back for further study, or order an evidentiary hearing to set a proper rate.

The principal service quality problem facing VRS is answer speed. Answer speed flows directly from the number of video interpreters available to handle a call. An inadequate number of interpreters increases answer speed and results in dropped calls as consumers simply give up trying to complete a call. HOVRS acknowledges that answer speed currently is waived for VRS. That, however, is no reason for NECA or the Commission to be unconcerned with the answer speed. Nor is it a reason for NECA not to examine the answer speed for which providers costed. Quite simply, if one or more providers costed inadequately to achieve their targeted answer speed or costed for a plainly inadequate answer speed, the effect on the VRS rate recommendation would have been to lower the proposed rate and perpetuate the current state of inadequate VRS service. NECA should have required providers to disclose their target answer speeds so that it and the Commission could ensure that providers' proposed adequate staffing levels. If NECA is tasked with recommending the correct rate, that should require reviewing costs to ensure they are *adequate as well as ensuring they are not excessive*.

This is not a mere academic concern. In its review of Hands On's 2003-04 cost data, CGB advised Hands On that its projected interpreter staffing level for 2004 was inadequate to handle the

number of minutes it had projected. That prompted Hands On to devise a software program to project interpreter staffing levels and tie those staffing levels to a targeted answer speed. In submitting its proposed interpreter staffing costs to NECA, Hands On used this interpreter staffing program, costing for a 20 second answer speed for 80 percent of calls, and reporting this fact to NECA. It chose that proposed answer speed, approximately twice the 10 second (85 percent) answer speed specified in the TRS rules, in light that the Commission has waived the answer speed requirement for VRS and in light of its experience that video calls take a few seconds longer for equipment handshake than it does for text-based relay. Without similar data from the other providers, NECA has no basis to assume that the rate it has proposed will provide adequate VRS service. NECA cannot tell the Commission what service level to expect from its proposed \$7.29 VRS rate. More importantly, the Commission cannot tell the deaf and hard of hearing community what VRS service level it can expect. Without knowing this information, the Commission cannot set the 2004-05 VRS rate to meet Congress's requirement for functionally equivalent telecommunications service. The Commission must therefore reject NECA's recommendation and either send it back to get the data needed to set a rate that will provide functional equivalent service, or get the data itself by holding an evidentiary hearing.<sup>5</sup>

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<sup>5</sup> NECA did obtain from providers projected occupancy and utilization data. With a lot of work, and making several assumptions, that data could be reviewed to arrive at an approximation of projected answer speed. However, NECA for reasons which are not apparent, chose not to

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include that data in its rate submission. So there is no way from review of the NECA Rate Submission that the Commission can make its statutorily required finding that the proposed rate will provide functionally equivalent service.

Similarly, NECA has admitted it lacked sufficient data to apply CGB's proscription of an 11.25 percent rate of return on investment for TRS providers. Rather than asking for the data it knew it lacked,<sup>6</sup> NECA attempted to fashion a proxy that applied the 11.25 percent figure to working capital. NECA's filing, however, provides no justification for use of this rather novel proxy. The Commission cannot just assume NECA's methodology is valid because NECA is the TRS fund administrator. If it were, the Commission could junk Part 32 and Part 65 of its rules and merely review the working capital needs of its regulated carriers. For this additional reason, the Commission should reject NECA proposed VRS rate and instruct it to obtain sufficient information to proposed a rational, compensatory rate that will afford the deaf and hard of hearing community VRS service which is functionally equivalent to telephone service available to hearing persons.

***B. NECA's proposed rate is predicated on the Bureau's flawed June 30, 2003 interim rate order.***

The Commission must reject NECA's proposed VRS rate because it purports to be based on the Bureau's June 30, 2003 order which established an interim VRS rate of \$7.751. That order is currently on reconsideration. There are severe problems with that order which are fully explained in the various petitions for reconsideration, including the fact that CGB exceeded its delegated authority in issuing the order when it recognized that there were novel issues of law and fact presented. *See also* CSD Comments at 6-13. The full Commission needs to issue an order on reconsideration of that June 30, 2003, order with expedition, and having resolved those issues, either

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<sup>6</sup> NECA's failure to obtain this data is puzzling since it is specifically required to obtain from providers data on "total TRS investment." FCC Rule §64.604(c)(5)(C). That requirement, of course, does not mean that the rate of return should be calculated on investment only as the June 30, 2003, interim rate order assumed.

send the rate proposal back to NECA for revision in light of the reconsideration order, or set the rate for resolution through an evidentiary hearing.

***C. The June 30, 2003 order was not a sufficient guide for NECA's evaluation of provider cost estimates for 2004-05.***

NECA purports to have relied on the June 30, 2003 interim rate order as its basis for examining provider cost data. That cannot be true because the June 30, 2003 order provides no actual guidelines for evaluating provider costs. Other than purporting to apply an 11.25 percent rate of return on investment – for which the Bureau itself lacked sufficient information to determine – the June 30, 2003, order provides absolutely no guidelines for NECA's review of provider cost data.

The June 30, 2003, order is purposefully vague on the adjustments CGB made to providers' 2003-04 costs. The sole discussion in that order, other than on the issue of rate of return, is set forth at paragraph 36. It is reprinted in its entirety below:

36. In addition, some providers appear to overstate their interpreter salaries due to estimates that incorporate labor inefficiencies and excess capacity, or that are based upon inconsistent reimbursable minutes and labor cost behavior. Further, the data filed by three providers either contains various errors or is predicated on incorrect assumptions and therefore is not reliable; for this reason, we have eliminated them from our consideration in their entirety.

Given that NECA failed to adjust any provider's interpreter costs, it is clear that paragraph 36 could offer no guidance for the cost adjustments NECA claims were mandated by the June 30, 2003 order.<sup>7</sup> In light of the obvious disconnect between what NECA claims it based its review on

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<sup>7</sup> NECA representatives have stated that the FCC has given them no other written



and what it admits to have adjusted,<sup>8</sup> the Commission can have no confidence in NECA's cost adjustments outside of the issue of rate of return.<sup>9</sup>

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guidelines for evaluating provider costs, and in response to undersigned counsel's request, have not disclosed any oral guidance provided by Commission staff. Of course, any such non-record instructions would violate the Commission's ex parte rules, the Administrative Procedures Act and provider's due process rights.

<sup>8</sup> NECA's discussion in its proposed rate filing of the adjustments it made and the reasons therefore is plainly inadequate as NECA itself recognized, but nevertheless failed to remedy. *See* NECA Submission at n. 34. Given that NECA itself believed its discussion was inadequate, the Commission can hardly have any confidence in it.

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<sup>9</sup> As we discuss below, NECA's treatment of the rate of return issue is seriously flawed as well, even were one to accept the propriety of the CGB's use of the return on investment only methodology, which is currently subject to reconsideration.

***D. To the extent the June 30, 2003 order gave NECA adequate guidance, the record is bereft of any indication that NECA followed that guidance.***

Whatever guidance NECA actually received from the June 30, 2003, order, there is no evidence from its rate submission that it followed that guidance. At no point in its admittedly bare bones discussion of its costs adjustments and the reasons therefore, does NECA relate those adjustments to the June 30, 2003, order. For example, NECA claims to have made an adjustment for certain research and development expenses relating to VRS. Nowhere in the June 30, 2003, order did CGB indicate that R&D expenses were not appropriately included in the rate. In fact no written guidance exists in the FCC's reported decisions indicating that R&D expenses are an inappropriate rate factor.

R&D costs are an appropriate element of a rate when it is for the benefit of consuming ratepayers. *Communications Satellite Corporation*, 90 F.C.C.2d 1159 (1982). *See Public Service Company of New Mexico v. FERC*, 832 F.2d 1201, 1214-15 (10<sup>th</sup> Cir. 1987). *See also* Satrom, *Office of Consumers' Counsel v. FERC*, 2 Energy Law Journal 119 (1981); Comments of Ed Bosson (May 21, 2004) (Mr. Bosson, Texas Relay Administrator, has aptly been described as the father of VRS). Where R&D stands to benefit deaf and hard of hearing consumers of VRS, those expenses are manifestly appropriate cost elements to the VRS rate. Indeed, exclusion of R&D is particularly inappropriate given Congress's direction to the FCC that its regulations "not discourage or impair the development of improved [relay] technology." 47 U.S.C. §225(d)(2). Moreover, the Commission's recent orders waiving certain VRS and IP Relay requirements condition those waivers on providers reporting on their R&D efforts to meet the waived requirements. *See*

*Telecommunications Relay Service*, 18 FCC Rcd 12379 (2003). Given that the Commission expects R&D to meet waived requirements, it was irrational of NECA to eliminate R&D expenses.

Similarly, NECA's fashioning of a proxy for the 11.25 percent rate of return on investment only proscribed in the June 30, 2003 order, failed to follow that order's guidance. NECA admits it failed to obtain the information necessary to calculate the rate of return. Rather, it fashioned a proxy aimed at applying the rate of return figure to provider's working capital. Apparently, NECA's theory is that provider's working capital is a proxy for their investment. That theory is not just unsupported, but is contrary to the Commission's rules and case precedent. As the 10<sup>th</sup> Circuit has explained, "the return on investment is computed by multiplying the rate base – the value (net of depreciation) of the shareholder's investment in the enterprise which is allowed to public use – by the "overall rate of return found to be just and reasonable by the Commission." *Public Service of New Mexico v. FERC*, 832 F.2d at 1205-06. The rate base is in turn composed of a company's capital structure, i.e., bonds, preferred stock and common stock. *Nepco Municipal Rate Commission v. FERC*, 668 F.2d 1327, 1335 (D.C. Cir. 1981), *cert. denied* 457 U.S. 117. FCC Rule Part 65 is in complete accord with the D.C. Circuit's explanation. Working capital is an add on to the rate base, not a substitute for it. *Public Service of New Mexico v. FERC*, 832 F.2d at 1219-22. FCC Rule Section 65.820(d) so specifies. Accordingly, it is manifest legal error for NECA to propose that the rate of return apply only to working capital and not to the TRS/VRS provider equivalent of a rate base.

Moreover, even assuming NECA's newly fashioned scheme for applying rate of return were otherwise appropriate -- and it is not -- NECA's method of applying it here is still erroneous. NECA applies the rate of return by applying one-twelfth of 11.25, plus a 40 percent tax allowance

times one month's VRS billings. NECA rationalizes the one-twelfth figure on the basis that it will pay providers at the end of the month following the end of the month when service is provided. This assumes that providers' working capital needs are for a one month period, i.e., from the end of the month in which service is provided until the end of the next month, one month. That is plainly incorrect. The problem with NECA's approach, is that providers incur costs starting at the beginning of the month in which service is provided, and continuing throughout that month, then providers have the carrying costs of that working capital until payment from the TRS Fund. The D.C. Circuit has explained this process precisely:

A utility's actual need for working capital can be most accurately determined by performing a lead-lag study of the average number of days that passes between payment of expenses and receipt of revenues for a given service. One part of this calculation is the "revenue lag" – the number of days between the time expenses are incurred for services and the date of billing for those services – and the "payment lag" – the number of days between billing and payment. A utility also experiences "lead time" when it received payment for services before it pays the expenses associated with those services. The number of lag days minus the number of lead days yield a net lag which represents the utility's actual needs for working capital.

*Boroughs of Ellwood City, Grove City, New Wilmington, Wampum, and Zelienople v. FERC*, 731 F.2d 959, 963 (1984) (footnotes and citations omitted).

The exact way providers incur these costs obviously varies, and NECA of course failed to seek this information through a "lag-lead" study as required by FCC Rule §65.820(e). However, what is clear is that NECA omitted entirely to consider the "revenue lag" portion of working capital. If we make the very reasonable assumption that the bulk of providers' costs are labor costs and that most providers pay their employees semi-monthly, then two very important conclusions are apparent. First, TRS providers have little if any "lead time," that is receive payments prior to paying

expenses. And Second, TRS providers’ “revenue lag” is significant. It is plainly obvious then that NECA undercounted the working capital needs of providers.

Assuming providers pay their employees bi-weekly, semi-monthly or weekly, it leads to the conclusion that a 45 day working capital assumption is most appropriate. That should be no surprise to NECA since NECA itself has urged this Commission to adopt up to a 45 day working capital assumption for small telephone companies. *See* NECA Comments in Docket 02-313 and 02-390 on FCC Rule §65.820. The 45 day rule appears to be well established in utility regulation. *See Public Service of New Mexico v. FERC*, 832 F.2d at 1220. Since NECA’s working capital methodology fails to recognize the significant costs incurred by providers prior to billing the TRS Fund, NECA’s working capital assumptions appear facially invalid. The Commission must therefore reject its proposed rate and either tell it to try again or set a hearing to determine the appropriate rate.

***E. NECA has no delegated authority to judge the appropriate level of provider costs estimates.***

It is an elementary principle of administrative law that an agency may not sub-delegate its power without clear authority from its enabling statute. *Vierra v. Rubin*, 915 F.2d 1372 (9<sup>th</sup> Cir. 1992); *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of State of Montana*, 792 F.2d 782 (9<sup>th</sup> Cir. 1986). *See Save Our Wetlands v. Sands*, 711 F.2d 634, 641-43 (5<sup>th</sup> Cir. 1983). There is nothing in Section 225 which allows the FCC to delegate to a private entity such as NECA the authority to determine the appropriate costs of TRS. *See* 47 U.S.C. §225(b)(3). Nor is there any other provision in the Act which can be construed to authorize sub-delegation of this function to a private entity. In fact, Congress was explicit when it desired to authorize the Commission to sub-delegate the authority Congress delegated to this agency. *See* 47 U.S.C. §§154(f)(4) (amateur radio examinations, and amateur and citizens band violation

monitoring), 251(e)(numbering administration), 252 (interconnection agreement arbitration), 254 (universal service); 410(a) (joint boards), 410(b) (state commissions), 410(c) (Federal-State Joint Board). In the absence of similar authority to sub-delegate, this Commission may not sub-delegate to NECA, or any other private entity, the authority to judge provider cost data. That is authority this Commission must itself exercise.

Moreover, although FCC Rule §64.604(c)(5)(iii)(C) gives the Commission and the TRS Fund administrator authority to examine, verify and audit data received from providers to insure the accuracy and integrity of fund payments, it gives no authority to the administrator to exclude categories of costs or to substitute its judgement for the good faith judgement of providers. Apparently stung by the Bureau's rejection of its 2003-04 recommended VRS rate, however, NECA appears now to have arrogated that authority to itself without any Commission delegation, without any written guidelines, and without any formal due process rights of providers to contest, correct, or confront NECA on its cost adjustments. NECA's actions are therefore *ultra vires*. The Commission must reject NECA's *ultra vires* rejection of provider cost data. If the Commission intends NECA to second guess provider cost items, it must establish a fair procedure for such actions which ensure meaningful Commission review and oversight, not mere rubber stamping. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5<sup>th</sup> Cir. 1974), *cert. denied* 421 U.S. 944 (1975); *Save Our Wetlands v. Sands*, 711 F.2 at 641-43.

***F. To the extent the Commission appropriately delegates to NECA authority to second guess provider cost data, it must establish due process safeguards, including notice and a fair opportunity to be heard.***

If the Commission intends NECA to have the authority to second guess provider cost items, it must establish a fair procedure that affords providers and the public notice and an opportunity to offer evidence in support of those costs. The procedure followed to set the 2004-05 VRS rate denies providers due process because they do not have adequate notice of why their cost items were adjusted, nor a meaningful opportunity to be heard in opposition to NECA's adjustments.

With respect to notice, NECA's rate submission fails to itemize the cost adjustments made.<sup>10</sup> At best NECA has provided a vague discussion of adjustments made and has admitted to an inadequate discussion of the reasons why it made those adjustments. That is a plainly inadequate basis to expect that meaningful public comment on the rate submission will comport with constitutional due process of law since interested parties are denied the opportunity to know what NECA actually did and why.

Similarly, there is no meaningful opportunity to be heard in this proceeding because the individual cost adjustments NECA made are not even before this Commission. Those cost

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<sup>10</sup> We are talking here about line item adjustments NECA made to provider cost data. We are not talking here about NECA's formulation of profit or rate of return, even though as we have explained above NECA's formulation of a return component is erroneous. NECA has adequately explained what it did with respect to the rate of return issue and providers and the public have a sufficient basis to explain why the rate of return component NECA has formulated is inappropriate and why the rate of return methodology contained in the June 30, 2003 interim rate order is having a devastating effect on VRS functional equivalence. *See, e.g.*, CSD Comments at 10-



exclusions have not been detailed in NECA's rate submission and NECA has stated to Hands On that no other materials have been provided the Commission other than the rate submission itself.

Hands On obtained from NECA a statement of the items NECA say it included from Hands On in its rate formulation. Based on that statement, Hands On derived the items NECA apparently excluded from Hands On's cost estimates, and confirmed those exclusions with NECA. However, this all occurred *after* NECA made its rate recommendation public, and despite lengthy discussions, NECA was unwilling to reconsider even one single item of its exclusions of Hands On's cost data.<sup>11</sup>

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<sup>11</sup> For example, it was brought to NECA's attention that it excluded from the VRS rate Hands On's CPA audit expense, a plainly irrational and erroneous exclusion. Indeed, NECA specifically included in the fund calculation, the cost for an annual audit of the TRS Fund by an independent auditor. NECA Rate Submission at 17. NECA refused to modify its rate submission even to fix this plain error. This raises the serious question of NECA's judgement, fairness and motivation in evaluating provider cost data. This is yet another reason why the Commission should set this rate determination for evidentiary hearing where providers, and NECA personnel will be required to provide sworn testimony and be subject to cross-examination on disputed cost items.

In any event, neither NECA's statement provided Hands On, nor the lengthy discussions that followed are of record in this proceeding and available for public comment as contemplated by the APA, and FCC Rule §1.401 et. seq. If NECA is to be authorized to second guess provider cost data, then all the providers and the public, especially the deaf and hard of hearing public that TRS/VRS are designed to serve, have a right to comment on all those exclusions. That right trumps any one provider's right to confidential treatment of those costs.<sup>12</sup> Once NECA or the Commission has a question whether a cost item is appropriate or justified, that item legitimately must be subject to public comment. To the extent confidentiality can be maintained, it should be. But confidentiality may not be a shield to protect a potentially erroneous cost exclusion or inclusion from being subjected to public scrutiny. That amounts to a denial of fundamental fairness to all affected persons, providers and more importantly, the deaf and hard of hearing community. In the end, it is deaf and hard of hearing persons who suffer most from inadequate VRS service if the rate the Commission sets is inadequate.

***G. The bulk of the adjustments made to Hands On's costs are without basis.***

Hands On chooses here to discuss publicly the expense items it contests. It does so because it believes the confidential nature of this data is outweighed by the public interest in illustrating the

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<sup>12</sup> Hands On makes this statement despite admitting that in certain instances, it agreed with some of the adjustments NECA made to its costs. Hands On is not embarrassed to admit a mistake when it so realizes. NECA and this Commission should not be either. These issues are too important for the deaf and hard of hearing community for interested parties to take any other

arbitrary nature of the cost exclusions NECA made to its data. Hands On urges other providers to make the same determination.

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position.

NECA made cost adjustments amounting to approximately 50 percent of Hands On's proposed corporate overhead expenses. They were in the areas of Accounting, Human Resources, Operations, Engineering, Corporate Management and Other Expenses. Each area was cut approximately 50 percent. This implies those cuts were made in an arbitrary, across the board fashion. NECA personnel deny this. However, examination of what was done, reinforces Hands On's view that this is exactly what NECA did, consciously or unconsciously. NECA excluded salary expense for all senior corporate management except the president and the chief technical officer. In other words, NECA thinks Hands On should function without an executive vice president, chief operating officer and chief financial officer. NECA also eliminated software licensing costs for Hands On's VideoSign(SM) software,<sup>13</sup> for its VRS platform software, and maintenance costs for its accounting software. Contrary to the procedures it claims it followed of repeatedly asking for explanations, *and excluding costs after "repeated requests for explanation did not achieve a satisfactory result,"* NECA Rate Submission at 6, NECA at no point indicated to Hands On that it found Hands On's explanation for any item inadequate.<sup>14</sup>

In an effort to understand why Hands On's administrative costs were excluded, Hands On asked NECA for an explanation. In response Hands On was informed that NECA focused on the cost of Hands On's proposed Pacific Northwest call center -- now in operation -- and that its projected costs for this call center in 2004 were out of range with other call centers, so NECA then

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<sup>13</sup> As explained above, the free NetMeeting video software is inadequate to provide the quality VRS Hands On is dedicated to deliver the deaf and hard of hearing community.

<sup>14</sup> We are troubled by NECA's use of the phrase "achieve a satisfactory result." We did not understand that either NECA or the Commission intended this exercise to be result oriented. Rather we understood it to be driven by the legitimate costs providers incur in delivering functionally equivalent service. Yet again, a hearing is necessary we believe to deduce exactly what

looked closely at the company’s expenses to determine why. Thus, NECA seemed to be saying that because the start-up call center’s expenses were out of the range of other call centers, NECA closely examined the company’s expenses. Yet, when confronted with the fact that Hands On allocated only 14 percent of its administrative expenses to the Pacific Northwest call center, and that NECA said it did not cut any interpreter related expenses, NECA backed off from this explanation and reverted to reciting that it looked at all providers’ expenses.

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cost cuts were “result” driven.

Whichever explanation might be true, the obvious reason the startup call center's expenses were higher than other call centers was *because it was a startup*, and because Hands On projected for it to commence 24 hour operation during 2004 so the deaf and hard of hearing community could once again have 24 hour service. Thus, the cost of that call center was a result of the trunking inefficiencies of being a startup and of projecting 24 hour service, not because of the relatively limited company administrative costs allocated to it.<sup>15</sup> This is plainly evident had NECA looked at the projected 2005 costs for this call center which Hands On provided to it. That data showed that with a 40 percent allocation of corporate overhead, the projected cost per minute of this call center were considerably less than Hands On's Rocklin call center. This fact apparently did not factor into NECA's relative cost analysis. The obvious question is why not.

With respect to specific cost items NECA excluded, these are discussed below.

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<sup>15</sup> Hands On chose the new call center for 24 hour operation because the fixed costs of operating that call center 24 hours a day are less than those that would have been incurred operating the Rocklin, CA call center 24 hours a day. In addition, the new call center was chosen for 24 hour operation because of interpreter availability. Had NECA actually inquired why – and it did not – it would have been told this. The unanswered question is why didn't NECA ask why.

*Accounting.* NECA cut three of six positions in 2004 and four of seven positions in 2005, including expense for a Chief Financial Officer (“CFO”), limiting costs to a comptroller and two staffers. NECA also cut funds for Hands On’s CPA and the yearly audit, as well as maintenance and support for Hands On’s accounting software. Hands On does not dispute NECA’s cutting of two staff positions for the accounting department. Hands On actually had advised NECA prior to the rate being publicly announced that it had budgeted for one staffer too many. Beyond that, reasonable people might differ as to whether a second staffer should have been excluded. Where reasonable people cannot differ is the need for a CFO to have overall supervision of the financial operations of the company. Given the need for detailed financial projections made for a period of two years out as NECA requires, the expertise of a CFO is plainly necessary for a TRS provider. Reasonable people ought not to be able to differ about the need for an accounts payable person, a purchasing agent and a mail room/file clerk for a company with two separate calls centers, administering three separate VRS platforms and projected to do more than 20 percent of VRS minutes in 2004 and 2005. These expense items were valid and should have been included in the rate calculation.

Beyond that, elimination of accounting software maintenance and support and CPA/audit expense is simply arbitrary and irrational. NECA does not think the TRS fund can do without an audit. Does the Commission really expect TRS providers to do so as well. And the need to maintain accounting software should require no further discussion. Finally, at no point did NECA indicate to Hands On prior to its rate submission that it considered these costs unnecessary, nor has NECA discussed that it made similar cuts in other providers’ expense items. The conclusion that these cuts were arbitrary is plainly evident.



*Engineering.* NECA cut one senior engineer and two engineering staff in 2004 and two senior engineers and three staff in 2005. NECA said it increased engineering consulting in 2004 as a result of discussions with Hands On which indicated that Hands On had underestimated engineering consulting prior to hiring its chief technical officer. In discussing these cuts with NECA, NECA rejected the view that Hands On has three VRS platforms, AT&T, MCI and Hands On's own branded VRS service. NECA instead suggested that the company merely has three web sites. NECA's view omits to consider that separate billing and other records must be maintained for each web site, and that each site has its own incoming high speed Internet lines, and that each site has its own dedicated call center equipment.

Hands On asked NECA to confirm specifically whether Hands On's engineering costs were higher than that of other VRS providers. After all, NECA claims that is the chief reason it made cost adjustments. NECA refused, stating the answer would not help resolve the rate level issue. That refusal is stunning. It casts grave doubt on whether NECA actually did what it claims to have done in making cost adjustments. It casts grave doubt on NECA's proper role in this process. It casts grave doubt on the integrity of this entire process. If NECA is unwilling to provide essential data in order to allow evaluation of the validity of its costing review, the Commission can have no confidence that its review was fair, reliable or justified. How can Hands On argue NECA is incorrect in excluding its engineering expenses, if NECA is unwilling to admit whether Hands On's engineering expenses were higher than that of other VRS providers whose engineering expenses were not cut. The conclusion that something is terribly amiss in this process is manifest. A hearing is required to resolve these serious and substantial issues of fundamental fairness.

Hands On represents that currently, and since July of 2003, its engineering staff has been undermanned. 60 to 80 hour weeks are common. Hands On specifically limited the engineering costs it proposed and gave detailed job descriptions of its proposed engineering personnel because it was mindful of the CGB's exclusion of a portion of its engineering costs in the 2003-04 interim rate, and wished to avoid a fight over this expense. For NECA to have cut this expense in some arbitrary fashion, apparently without even making a finding that the expense exceeded other providers' expenses once again raised the clear inference that what NECA did was to make arbitrary cuts in Hands On's expenses because of the startup expenses associated with its Pacific Northwest call center. Such action would plainly be improper and an abuse of the trust the Commission has placed in the fund administrator.

*Operations.* NECA cut Hands On's expense for its COO and for all but one operations staff person, as well as all consulting expense associated with this department.<sup>16</sup> The rationale for cutting the COO, again, was that in NECA's opinion, "Hands On had too many executives." Hands On pointed out that the web sites of its two chief VRS competitors, Sorenson Media and CSD show similar, if not a substantially greater number of executives. NECA's response was that these companies are engaged in other enterprises. Perhaps, however, Sorenson's -- which appears to have the most similar executive complement to Hands On -- public statements indicate that VRS is now its chief line of business. And CSD, though providing traditional TRS and community interpreting besides VRS,<sup>17</sup> shows many more executives on its web site than for which Hands On costed.<sup>18</sup>

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<sup>16</sup> No adjustment was made for operations support personnel, consisting of administrative assistants and in house interpreters who support the several deaf persons Hands On employs.

<sup>17</sup> Hands On's sister company, Hand On Sign Language Services, Inc. also provides

Since from publicly available information, it is clear the Hands On’s executive personnel do not exceed other similar providers, it is apparent that NECA’s exclusion of those executive personnel was arbitrary.

*Human Resources.* NECA included in its VRS rate calculation costs from Hands On for an HR director and one staff person. Hands On had costed for two staff persons in 2004 and three in 2005. Staff persons projected included an HR manager, a benefits coordinator and a recruiter. In fact and after further review of its projections, both 2004 and 2005 should have costed for three HR staff persons since each call center requires a recruiter. Recruiting qualified interpreters for a VRS call center is a full time job. Each of Hands On’s call centers need a full time recruiter. And while the HR manager position and the benefits coordinator position are legitimately jobs for two persons, Hands On will not push the point here. But what this means is that NECA unjustifiedly cut one community interpreting. Hands On made an allocation of administrative expense between its community interpreting and its VRS businesses.

<sup>18</sup> The inference can also be drawn that NECA’s cost adjustments with respect to Hands On reflect a bias against small start-up entities. We are reluctant to argue that inference, but it is apparent from the explanation NECA provided for excluding Hands On’s executive expenses.

position in 2004 and two in 2005. NECA's rate recommendation should therefore be sent back to it with instructions to fix this deficiency.

*Corporate Overhead.* NECA cut the expense associated with the company's executive vice president, and his assistant. This was erroneous for the same reason discussed with respect to the COO. NECA also disallowed interest expense and management consulting. The stated rationale with respect to the interest expense was that "interest is not covered in the instructions to the form used to collect cost information.' NECA's deficient forms are not a good basis for excluding legitimate expense items from the VRS rate calculation. Suffice it to say that interest costs are includable in the rate base pursuant to FCC Rule §§65.800 and 65.820. The exclusion of this item was therefore contrary to the Commission's rules. NECA gave no reason why it excluded management consulting so Hands On is at a loss to understand why this cost is not an appropriate rate component, especially given that NECA sliced costs for most of Hands On's management team.

*Other VRS expenses.* As reported in its submission, NECA removed the profit and taxes items and substituted its own version of a rate of return plus tax allowance. We have already addressed why this was error and will not repeat the analysis here.

NECA also eliminated software licensing expenses for Hands On's video software program and for its platform management software. It appears these costs were excluded because NECA did not understand them. And while Hands On will assume whatever blame is merited for any lack of adequate explanation of these software costs, at no point did NECA ever advise the company that Hands On had not provided an adequate explanation for these software licensing fees. These expenses are incurred on the basis of a percentage of revenues in one case and profit in another. That is because these two software programs were obtained for no up front cash expenditure.

Because Hands On did not know what its revenue or profit would be, since these are factors of the final VRS rate, Hands On assumed a rate level and reported that rate level to NECA, expecting NECA to adjust this cost in its rate calculation based on the NECA's final recommended rate. NECA's sole question concerning these expenses was the basis for the rate assumption, and NECA was informed that it was a best estimate. At no point did NECA advise that this was not an acceptable way to proceed, or ask for further justification of the expense, despite that this is how NECA represents it proceeded with respect to a cost it excluded from its calculations. These software costs are legitimate and necessary expenses. The VideoSign(SM) software is necessary to improve and maintain the video quality that is so important to the deaf and hard of hearing community striving to communicate in their natural visual language in a functionally equivalent manner to hearing persons. The platform management software is necessary to deliver the myriad of data and reports, including billing reports, which the Commission and NECA require or have the authority to require. The Commission should reject the NECA recommended VRS rate and direct NECA to recalculate the rate to include these items, or hold a hearing to set the 2004-05 rate with appropriate cost items included.

Finally, NECA excluded Hands On's outreach program of making on premises installs of video cameras and VRS software. The reason NECA gave is that the TRS Fund does not pay for customer premises equipment. However, Hands On's installation program is designed to provide deaf and hard of hearing persons with connectivity, including on-site troubleshooting, software installation and training. For traditional TRS, this is generally funded via the state TRS programs. No state to our knowledge funds such a program for IP Relay or VRS. Thus, it is appropriate that the Interstate TRS Fund should ensure connectivity for VRS users. In any event, Hands On is aware

of no policy ruling from the FCC supporting NECA's position. NECA has no authority to set policy, and in the absence of such authority or FCC policy statement, its exclusion of this item is inappropriate.

***IV. Conclusion and recommendations.***

It is readily apparent that serious deficiencies exist with the proposed 2004-05 VRS rate. From merely a reality check standpoint, the Commission must closely review NECA's proposed VRS rate since it proposes to decrease the VRS rate for 2004-05 in the face of clear and convincing evidence that the current interim higher rate is inadequate to provide deaf and hard of hearing persons with functionally equivalent telecommunications service. NECA's own TRS Advisory Council so concluded in unanimously rejecting the proposed rate in its April 2004 meeting.

As we have shown, the deficiencies leading to NECA's recommended VRS rate are many. NECA did not obtain sufficient information to formulate a rational, compensatory rate for functionally equivalent VRS service. Although NECA purported to follow the Bureau's June 30, 2003, interim rate order in formulating the 2004-05 VRS rate, that June 30, 2003, interim rate order itself suffers serious debilitating flaws for the reasons already of record in this docket, and as explained in the confidential submissions of various VRS providers and carriers. Moreover, the June 30, 2003, interim rate order itself is an inadequate guide for NECA's formulation of the 2004-05 VRS rate, because it totally lacks standards and guidelines for evaluating provider cost data. Even if the June 30, 2003, interim rate order were an appropriate guide, there is no evidence in NECA's rate filing that NECA appropriately followed the interim rate order. In fact it appears that NECA now sees itself as an independent judge of appropriate VRS expense items and has abrogated to itself the authority summarily to exclude such cost items. The FCC, however, has never delegated

this authority to NECA and the FCC itself has no statutory authority to make this sub-delegation. Therefore, NECA's action in excluding items, is *ultra vires*. Even were NECA appropriately delegated authority to exclude provider costs, providers' due process rights are violated by the process NECA followed since they have neither notice nor a meaningful opportunity to be heard on those exclusions, nor even access to the information NECA used in making its cost evaluations. And the opportunity to submit comments here on NECA's proposed VRS rate level is totally inadequate to afford providers due process since the information NECA relied upon, and the cost adjustments it made have not been disclosed and made available for public comment. Finally, to the extent NECA was willing to explain its methodology to Hands On with respect to adjustments made to Hands On's costs, most of those adjustments were arbitrary and capricious, apparently the result of a lack of understanding of those items, or apparently result from an unintentional, but nevertheless invidious bias which penalizes start-up stand-alone operators such as Hands On in favor of integrated providers or larger diversified companies. For all of these reasons, the Commission can have no confidence in NECA's VRS rate recommendation just as the TRS Advisory Council had no confidence in that rate recommendation.

When this comment period runs, the Commission will be left with less than one month to set the TRS rates for 2004-05. With all due respect to this agency's resources and talents, it cannot be done, and should not be done on that time frame for two reasons. First, there is currently pending before the several Commissioners the various reconsideration requests associated with the 2003-04 interim VRS rate. It appears fair to say that decision will directly affect consideration of the 2004-05 rate. It would be administratively wasteful to issue an order on the 2004-05 VRS rate without the benefit of the decision on the 2003-04 rate. Second, because of NECA's admittedly inadequately

explained cost adjustments, and the simple reality check realization that if the current rate is inadequate, lowering the rate will not improve VRS quality, the Commission lacks sufficient information to determine an adequate VRS rate. What then should the Commission do?

First, it should not be forced into a decision on the 2004-05 VRS rate, merely because time is running out. Rather, it should follow the lead of the TRS Advisory Council not to accept the NECA recommended VRS rate. Instead, it should adopt the NECA recommended rates for traditional TRS and STS, subject to any adjustment that is appropriate once it finally resolves the issue of the proper rate of return or profit calculation. With respect to VRS, the Commission should do one of the following: if it finally resolves the 2003-04 rate, that rate should remain in effect until the Commission resolves the 2004-05 VRS rate, even if after July 1, 2004. If the Commission does not resolve the 2003-04 rate before July 1, 2004, and we beseech the Commission to do so, the current interim VRS rate should remain in effect pending final resolution of the 2004-05 VRS rate. Alternatively, the Commission should adopt on an interim basis the unadjusted VRS rate NECA reported of \$9.895. NECA Rate Submission at n.35.

Second, to resolve the issue of questioned costs, the Commission should order an evidentiary hearing before an administrative law judge with all VRS providers, vendors and NECA being made parties. The Chief of the Consumer and Governmental Affairs Bureau and the Chief of the Wireless Competition Bureau should also be made parties, with the opportunity for intervention by representatives of the deaf and hard of hearing community. Section 204 of the Act mandates hearings for ratemaking. Given that factual issues are in dispute in this case, the best way to resolve these matters is through an expedited evidentiary hearing with expert testimony and cross-examination, rather than the apparent ad hoc evaluation NECA performed on providers' cost data.



The deaf and hard of hearing community deserve no less than assurance that the VRS rate – which will drive VRS service quality in 2004-05 – is rationally based to achieve functional equivalent telecommunications service.

Respectfully submitted,

**HANDS ON VIDEO RELAY SERVICES, INC.**

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*Certificate of Service*

**I, George L. Lyon, Jr., do hereby certify that I have caused copies of the foregoing Comments on Payment Formula And Fund Size Estimate For The Interstate TRS Fund For 2004-05; Request For Full Commission Action; And Request For Designation of Evidentiary Hearing Comments on Notice of Proposed Rule Making to be served on the following via first-class mail, except where noted, postage pre-paid:**

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